



FORT LAUDERDALE

February 2, 2007

Scott Bums
Cecile Piverotto, Esq.
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, PL 33401

Re; Comments on the January 4, 2007 version of the Regional Water Availability Rule

Mr. Burns and Ms. Piverotto:

We are just in receipt of the newest version of the RWA Rule dated February 1, 2007, but we have not had the opportunity to fully review that version yet, the comments herein are directed at the previous version dated January 4, 2007.

Our comments are split into general and specific comments.

General Comments:

Sustainable Yield of the Biscayne Aquifer. As a result of the RWA Rule, if implemented, water utilities will be required to implement alternative water supply projects. Before establishing a multi-billion dollar burden on public water utilities by promulgating this Rule, there should be some underlying resource-based analysis.

Lake Okeechobee Initiatives. The City is also keenly aware of other initiatives the SFWMD and the U.S. Army Corps of Engineers ("Corps") have undertaken, further limiting the availability of water, which have a cumulative effect on the implementation of the RWA Rule. For instance, as you are well aware, the Corp is revising the Lake Okeechobee Regulation Schedule ("LORS"), The previous Tentatively Selected Plan ("TSP") for the revised schedule showed increased water restrictions and an impact to water supply that is relied upon to "backup" the Lower East Coast ("LEC") during water shortage. Because the first TSP showed the schedule was going to be held, on average, 12" lower than the existing schedule, there were significant regional water supply and demand management implications associated with its implementation.

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This result is even more concerning in the new proposed TSP because, on average, the Lake's schedule will be held approximately 18" lower than the existing schedule. The City has yet to see any modeling regarding the impact of LORS revisions on water supply. Concurrently with the LORS revision, the SFWMD is about to move forward on rulemaking and the adoption of a new Water Shortage Plan that replaces the previous Supply Side Management methodology. While the Corps and the SFWMD have made statements that these efforts are being coordinated, the user community has not been apprised of all of these "moving parts" and their potential effect (or cumulative effect) on the implementation of the RWA Rule.

Burden-shifting to Permit Applicants. Many of the concepts in the RWA Rule require significant regional and sub-regional modeling to meet requirements for offsets or temporary allocations. This modeling requires a permit applicant to demonstrate that a particular withdrawal does not adversely impact the regional system, or that an offset provides a certain level of benefit to the regional system. While this modeling analysis is appropriate, it should not be placed on the shoulders of local government. Regional modeling should be a responsibility of the regional water resource agency, the SFWMD. While the City is willing to provide its fair share, the SFWMD should provide a more coordinated approach, and the modeling tools, to meet these modeling requirements on a permit by permit basis. For instance, seasonal modeling, versus monthly modeling, should be acceptable to the SFWMD to meet certain RWA Rule requirements.

Authority for the RWA Rule. Of significant concern is that the RWA Rule is, in reality, a massive "de facto" reservation of water for the natural system. Hence, the RWA Rule should be implemented under the SFWMD's water reservations authority in Section 373.223(4), F.S. Instead, the SFWMD is incorporating this RWA Rule into the Basis of Review for Water Use Permit Applications with the South Florida Water Management District ("Basis of Review"), and including it as part of the minimum flows and levels ("MFL") recovery strategy for the Everglades and the Northwest Fork of the Loxahatchee River established pursuant to Section 373.042, F.S.

The de facto water reservation codified by the RWA Rule is further bolstered by new language in the January 4 Rule Draft stating, "This section ... assists in implementing the objective of the SFWMD to ensure that water necessary for Everglades restoration is not allocated for consumptive use upon permit renewal or modification under this rule." The distinction between this regulatory approach and a water reservation is important in that Section 373.223(4), F.S. states, "all presently existing legal uses of water shall be protected so long as such use is not contrary to the public interest." As a matter of law and policy the SFWMD must follow the proper procedure for water reservations.

Specific Section Comments:

The following comments relate to specific sections of the RWA Rule. For the reasons outlined below, we focus some of the specific comments on addressing the language that has been added to the RWA Rule allowing permittees to demonstrate that projects implemented prior to April 1,

2006, and which provide "regional benefits", can be used to offset increases in allocation from the regional system. At this point we appreciate the SFWMD's efforts to address this concept, but we offer additional revisions to that concept because it does not fully address our concerns.

Section 3.2.1, E. states, "This section ... assists in implementing the objective of the District to ensure that water necessary for Everglades restoration is not allocated for consumptive use upon permit renewal or modification under this rule."

Comment: The SFWMD and Corps Lake Okeechobee Initiatives outlined above result in a reduction of regionally available water. Therefore, since the overall "water pie" is reduced by these Lake Okeechobee initiatives, as well as the implementation of Comprehensive Everglades Restoration Plan ("CERP") projects, stormwater treatment areas ("STAs") and Acceler8 projects, the amount of water available for existing legal uses is also reduced. A modeling analysis should be completed showing that with these additional demands for regional water, and the implementation of this RWA Rule, the base condition water use calculations still protect existing legal uses consistent with law.

Section 3.2.1, E.(2) "...cause a change on a monthly basis of surface..."

Comment: This comment is related to the issue outlined above regarding the increased modeling burden placed upon the permit applicant contemplated in the RWA Rule. Since the SFWMD operates the primary water management system, reviews daily forecasting data and makes decisions based on seasonal cycles, it is the repository for most of the data requested in the RWA Rule. Requiring permit applicants to show that their requested allocation will not cause a net increase in the volume or cause a change in timing on a monthly basis does not seem to comport with this seasonal approach; therefore, in this Section, the required modeling should be required on a seasonal basis.

Section 3.2.1,E.(3). The City's general comment on this section is that conservation effects must be factored into all use classes listed.

Comments:

Subsection (a) - The April 1, 2006 date continues to be a randomly chosen date when in reality its only significance is the fact that it is the same month that the SFWMD Governing Board took action to begin RWA Rule development. Backup materials presented to the Governing Board were based on 2005 data and that data was significantly influenced by the 2004 and 2005 hurricane season. This comment has been repeated by many other users previously. A five (5) year rolling average prior to April 1, 2006 is a more logical timeframe to determine base condition water use.

Subsection (a) - The City has been in the process of implementing a project converting the Peel Dixie plant to membrane treatment. The Peele Dixie facility was approved for construction prior to the RWA Rule being considered and will be operational in August 2007. That same facility, and the Fiveash facility, have both cut production to accommodate construction over the last 12-

24 months. For instance, the North Header discharge pressure which was 90-92 pounds per square inch ("psi") has been reduced to +/- 85 psi. Does the City get credit for that loss in the context of its pending consumptive use permit renewal pursuant to this Subsection of the RWA Rule?

Subsection (b) - It does not appear as though the process of measuring agricultural users' "base condition water use" based upon the acreage irrigated is comparable to the process for water utilities. That process is based upon previous use. Please explain how these differing determinations are justified and comparable in their results.

Section 3.2.1.E.(4), second paragraph: "If based on preliminary evaluation the proposed use has the potential for..."

Comment: What is meant by "potential" for increasing the withdrawal? The evaluation will show either an increase in withdrawal or not. That word should be stricken from the sentence.

Section 3.2.1.E.(4), fourth paragraph: "When evaluating the affects of the proposed use on the Waterbody..."

Comment: The City's use is approximately 50% irrigation and we receive no credit for return flow to the source. Agricultural classes receive credit for some component of their recharge benefit. The Agricultural class evaluations are also based on "near the point of withdrawal" while public water supply users' evaluations are based on "at the point of withdrawal". This appears to result in different methods of measurement. Please explain the difference.

Section 3.2.1.E.(5)(e): Last sentence: "...and the Acceler8 program."

Comment: This comment is related to non-consumptive uses that take water away from the "water pie". The Acceler8 program was designed to provide more available water but is now-classified as an additional base use. It is unclear what the overall effect of these projects will be on existing legal uses. A modeling analysis should be completed showing that with these additional demands for regional water, existing legal uses can be protected consistent with law.

Section 3.2.1.E.(5): Last paragraph before (6)

Comment: This section does not address additional water projects completed before April 1, 2006 not included in previous consumptive use permits. We suggest the following revisions:

~~Offsets, alternative water sources and terminated or reduced base condition water uses only implemented after April 1, 2006 shall be considered in addressing requested increases in withdrawals from a Waterbody.~~ Offsets, projects, alternative water sources and terminated or reduced base condition water uses implemented specifically pursuant to a permit limiting condition imposed for the purpose of reducing demands on the subject Waterbody prior to or after April 1,

2006 shall be considered in addressing requested increases in withdrawals from a Waterbody.

Section 3.2.1,E(6)(a) "Certified" Projects

Comment: This comment has been made by users in response to previous drafts of the RWA Rule but this has not been addressed. Please explain the process of "certifying" project water as available by the Governing Board.

We hope these comments are helpful to you in further revising the RWA Rule. Because of the significant nature of this rulemaking process we anticipate reviewing and providing comment on the next draft of the RWA Rule before it is finalized. For any questions you might have regarding these comments, please contact myself or John J, Fumero of Lewis, Longman & Walker, P. A, who has been assisting and representing the City relative to this rulemaking effort.

Sincerely.

A handwritten signature in blue ink that reads "Albert J. Carbon, III". The signature is written in a cursive style with a large, stylized "C" at the end.

Albert J. Carbon, III, P.E.
Public Works Director

c: John Fumero
Erin Deady
Julie Leonard